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ABSTRACT

In the field of education, the impasses that have occurred in collective bargaining for a contract have been resolved sooner or later--in one way or another. If a due process for settling the impasse has not been provided, both legal and illegal actions will take place in the attempt to force a more favorable settlement. Mediation, fact finding, and arbitration are the major mechanisms for resolving impasses. Arbitration is potentially the most valuable third-party mechanism for settling disputes. Arbitration is essentially a judicial proceeding. After holding hearings, the arbitrators render a decision, called an award, that spells out what action is to be taken with regard to each of the issues in the dispute. Compliance with the award is compulsory in binding arbitration; however, compliance is optional in nonbinding arbitration. Only a few states provide for some form of binding arbitration to settle collective bargaining impasses. Legalizing strikes in public education does not provide an effective due process for settling impasses. Legislation should be enacted to provide binding arbitration as the final step in settling collective bargaining impasses. (Author/MLF)

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Mechanisms for Resolving Collective Bargaining Impasses in Public Education*

by

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The Impasse

"There is no point to any further talk. This is an impasse. We're leaving." The speaker was the chief negotiator for the teachers' association. He and his associates picked up their papers and walked away from the bargaining table. The next day, the press carried a statement by the association negotiators accusing the board of education of not bargaining in good faith.

It was indeed an impasse. When either or both parties announce that it is impossible to reach agreement at the bargaining table and refuse to continue bargaining, an impasse exists.

An impasse is a crisis. It amounts to an announcement that the process of collective bargaining is not an effective means to reach agreement on whatever the issues are.

In theory, an impasse may be triggered by either party. In practice, the impasse is a tactic of the employee organization. The employer has nothing to gain from the breakdown of the collective bargaining process. The employer can afford to talk on and on. On the other hand, the employee organization wants and needs an agreement as soon as possible. If it requires an additional month or an additional year to reach agreement, it is likely to mean that wage increases and benefits will be lost for an additional month or an additional year.

An impasse may be the inevitable consequence of endless hours of bargaining without reaching agreement. Day after day, the negotiators began bargaining as the sun was setting and continued through the night until the sun was high in the heavens. But agreement could not be reached on issues believed to be vital. The time arrived when the spokesman for the employee organization announced, "There is no point to any further talk. This is an impasse."

On the other hand, the impasse may be a matter of strategy. The employee negotiators may believe that they have gotten as much as they can through the process of collective bargaining, but that what they got is not enough. They may believe that by creating an impasse, pressure can be applied which will produce additional concessions.

No generalization can be made as to whether an impasse is an unavoidable breakdown in the bargaining process or whether the impasse is a matter of strategy. The fact is that it may be either. A judgement on this matter can be made only by careful analysis on a case by case basis.

One has only to review the hundreds of impasses that have occurred in bargaining in the field of education to realize that an impasse can occur whether or not mechanisms are provided for resolving an impasse and reaching a settlement. The impasse is a fact of collective bargaining life. The inevitable conclusion is that if a due process for settling the impasse has not been provided, both legal and illegal actions will take place in the attempt to force a more favorable settlement.

In the field of education, the impasses that have occurred in collective bargaining for a contract have been resolved sooner or later - in one way or another. Illegal methods - including the job action and the strike - have usually though not always been effective in winning concessions that had been refused at the bargaining table.

Mechanisms for resolving impasses necessarily utilize the services of third parties. Mediation, fact finding, and arbitration are the major mechanisms. There is no panacea, but there is convincing evidence that third parties can be effective in reaching agreements. Let us analyse the third party mechanisms

most frequently advocated or utilized.

Mediation

Mediation is the mechanism where a third party tries to negotiate an agreement between the two principal parties. The mediator meets in Kissinger style with each party separately. The object of the mediator is to move the two parties closer together - to close the gap between the positions taken at the time that the impasse occurred. The mediator goes back and forth between the two parties. If there is more than one mediator, they may separate and work with both parties simultaneously.

The mediator tries to reason with each party and tries to be persuasive and convincing. He tries to show how the available conditions of agreement are advantageous to whichever party he is working with. If he succeeds in bringing the parties close together, he will have a joint meeting with both parties. At that meeting, if an agreement can be hammered out--the mediation has been successful.

The mediator is trying to find a formula for settlement that both sides will accept. The mediator is not seeking primarily to determine what settlement would be right and fair. The mediator must be pragmatic. Mediation succeeds only when and if both parties are willing to agree. One mediator said, "If both parties will agree that the moon is made of green cheese, that is O.K. with me."

Mediation is usually provided as a conciliation service by a state agency in accordance with state law. In Massachusetts, mediation service is provided by the State Board of Mediation and Arbitration. There is usually little or no choice as to the persons who will mediate or whether there is one mediator

or more than one.

Mediators have no authority. They do their best to negotiate a settlement. Mediation succeeds if both parties believe that the available settlement is as good as they can get.

Fact Finding

Fact finding is a widely used third party mechanism. Fact finding is also often a service provided by a state agency in accordance with state law.

While mediation tries to negotiate a settlement that each party believes is to its advantage, fact finding tries to appeal to both parties to be reasonable and to be mindful of the welfare of the children and the public interest.

The fact finder will request that all pertinent information be submitted. He will make such investigation as he sees fit. A hearing is held at which both parties and also other persons can present the facts as they see them. The fact finder deliberates and evaluates all of the facts that have been obtained. A fact finding report is issued. This report includes recommendations for settling the dispute or impasse.

The fact finding report is public information, but is not binding on the parties. If fact finding succeeds in getting the parties to agree on a settlement, it is because both parties have been convinced that the fact finder's recommendations offer as favorable a settlement as they are likely to get and that the consequences of prolonging the impasse will be unfavorable. If public opinion has been crystallized in support of the fact finders recommendations, the prospects of a settlement are enhanced.

As can be expected, fact finding does not always succeed in bringing about a settlement. For example, the Colorado Springs teachers overwhelmingly rejected a fact finder's recommendations to settle a dispute on the provisions of the new contract. Two days later on December 4, 1975, the teachers voted to strike for the first time in the city's 100 year history. The strike which began on December 4 lasted for twelve days.

Arbitration

Arbitration is potentially the most valuable third party mechanism for settling disputes. Arbitration is essentially a judicial proceeding. The arbitrator or arbitrators hold hearings at which each party to the dispute or impasse submits evidence. The arbitrators render a decision which is called an award. This decision is similar to the verdict of the court in a civil lawsuit. The award spells out what action is to be taken with regard to each of the issues in the dispute.

There are two kinds of arbitration: Binding arbitration and non-binding arbitration. Compliance with the award is compulsory in binding arbitration In non-binding arbitration, compliance is optional. Each party considers the award and makes a decision as to whether or not to accept it.

In the public school sector, school boards and state legislatures have been wrestling with the problem of what to do about arbitration since the famous Norwalk, Connecticut* case in 1951. This case arose as part of the aftermath of the 1946 Norwalk teacher strike which was one of the first teacher strikes in the United States. Along with the animosity engendered by the strike, the Board of Education and Teachers Association quarreled bitterly about their respective rights and their correct relationships. The Teachers Association claimed both the right to negotiate

* The outher was Superintendent of Schools in Norwalk, 1953-1970.

a group contract and to employ arbitration to settle disputes. Legal counsel for the Teachers Association encouraged the lawsuit in the belief that the court would mandate binding arbitration as the mechanism to use in settlin disputes. In the Norwalk case, the Connecticut Supreme Court of Errors rendered a declaratory judgement which was intended to provide guidelines for the relationships and rights of both the Teachers Association and the Board of Education.

With regard to arbitration, the declaratory judgement of the Connecticut Supreme Court of Errors in the Norwalk case limited the use of arbitration "to certain, specific, arbitrable disputes." The Court declared:

> ....If it is borne in mind that arbitration is the result of mutual agreement, there is no reason to deny the power of the defendant (the board of education) to enter voluntarily into a contract to arbitrate a specific dispute. On a proposal for a submission, the defendant would have the opportunity of deciding whether it would arbitrate as to any question within its power. Its power to submit to arbitration would not extend to questions of policy but might extend to questions of liability. Arbitration as a method of settling disputes is growing in importance and, in a proper case, "deserves the enthusiastic support of the courts." ....Agreements to submit all disputes to arbitration, commonly found in ordinary union contracts, are in a different category. If the defendant entered into a general agreement of that kind, it might find itself committed to surrender the broad discretion and responsibility reposed in it by law....
>
> The best answer we can give....is, "Yes, arbitration may be a permissible method as to certain specific, arbitrable disputes."

Twenty-five years later, this decision still prevails with regard to binding arbitration.

Available Mechanisms are Ineffective

In grievance procedures, it has become common practice to have some type of third party procedure as the final step. Some grievance procedures even provide for binding arbitration.

We must keep in mind that grievances usually deal with issues of liability. An individual or a group claim that under the contract or established policies, they are entitled to some benefit or privilege such as more pay or more time off. The issues are certainly important to the individuals concerned, but in a relative sense, the stakes are small to the board of education.

On the other hand, in negotiating a collective bargaining agreement, the stakes are high. It makes a big difference what new fringe benefits and salary schedules are established. These and other policy decisions can commit very large amounts of money. In the Norwalk case, the Connecticut Supreme Court of Errors declared that under existing Connecticut law, it would not be legal to delegate policy decisions to a third party.

In the twenty-five years since the Norwalk case, the Connecticut legislature has enacted several laws which establish and regulate collective bargaining in public education. There has not been legislation, however, to require or empower Connecticut school boards to use the mechanism of binding arbitration to settle collective bargaining impasses. The situation is similar in most of the other states. Only a few states provide for some form of binding arbitration. Wisconsin, for example, permits binding arbitration, but only if both parties enter into it voluntarily.

What conclusions can be drawn as to the effectiveness of available mechanisms

for settling collective bargaining impasses? In most situations, if binding arbitration is available at all, it is available only for grievance actions. The mechanisms which are available in collective bargaining impasses are just not effective.

Teacher strikes have become more and more common. In the 1969-70 school year, there were 181 teacher strikes. By 1970, an N E A survey reported that three out of four teachers believed that at least in some circumstances, teachers should strike. In the fall of 1975, 179 teacher strikes kept an estimated 2,000,000 children from attending classes. Teacher strikes are occurring in all parts of the country and in school districts of all sizes.

Impasses and Strikes are Costly for All Concerned

Many teachers associations are ready to accept binding arbitration, but school boards and legislatures are not. Why is this so? Judging from the statements made by those who are opposed to teacher strikes, it is a carry over from the past when school boards could dictate salaries and working conditions and it was not necessary to reach a bilateral agreement.

A retired teacher who opposes teacher strikes said,

....No one should be permitted to shut down a government operation for which taxes have been levied.

....public employees are a part of government, and strikes by government are intolerable and undemocratic too.

Strikes by government employees are a step on the road to chaos and anarchy, as well as a defiance of the voters and elected officials.

Another educator who opposes teacher strikes declared:

....Teachers who violate the law should be dealt with severely.

> They should know better. Law-breaking teachers cannot possibly instill in their students a respect for the law. In states with no-strike laws, contracts should include the stipulation that any teacher who violates the law is automatically fired.

Some who are opposed to legislation to provide binding arbitration believe that binding arbitration would give teachers greater benefits than they could otherwise obtain. These people prefer a weaker mechanism such as non-binding arbitration. Non-binding arbitration can be accepted or rejected by the board of education.

Of course, this is true. What these people overlook is that non-binding arbitration can also be accepted or rejected by the teachers association. Under present conditions, it is actually possible for the teachers association to reject the non-binding arbitration award, go on strike, and obtain a settlement which is greater than the arbitration award.

This is just what happened in Norwalk, Connecticut in 1969. Contract negotiations were stalemated and an impasse was declared. After mediation efforts failed, the dispute was submitted to non-binding arbitration. At issue were wage and fringe benefits with an estimated cost of approximately $400,000.

The arbitrators' award provided wage and fringe benefits with an estimated cost of $100,000. The Board of Education voted to accept the arbitrators' award, but the Teachers Association rejected the non-binding award and voted to strike. An injunction forbidding the strike was ineffective. After a four day strike, the Board of Education and the Teachers Association reached a settlement with wage and fringe benefits having an estimated cost of $300,000. This settlement was duly ratified by the Common Council of the City.

Had there been binding arbitration, the settlement would have been in accordance with the arbitrators' award. The cost to the City would have been approximately $200,000 less. Even more important, everyone would have been spared the turmoil, disruption, and animosity engendered by a strike.

Tom James reached the conclusion that "the record of state action promises that teacher power has little chance of becoming the ogre that many people expect." The alarmists are unrealistic because it is contrary to the "public will."

Teachers Are No Longer Docile

Times have changed. Increasingly, teachers are unwilling to accept wages and conditions that they believe to be unsatisfactory. Terrel H. Bell, U. S. Commissioner of Education recalls how it used to be:

> ...."Each year, we simply drew up a new salary schedule and presented it to the teachers as a gift from the benevolent father. And the teachers, hat in hand, said, 'Thank you.'"

As Paul Friggens wrote, this is no longer true. Ronald Corwin said that what seems to be new about teaching "is the scope and intensity of teacher militancy."

Public school teachers are determined to have an active role in the decision making process. To achieve this they are well organized. When they believe it is necessary, teachers will violate anti-strike laws.

The dissatisfaction and disillusionment of many teachers with present collective bargaining legislation is expressed by one teacher in the following:

> ....The collective bargaining law does not work as it is now written. School Committees still hold all the cards and can sit

back and say No, No and No.

This year we have exhausted what is available to us in bargaining in Massachusetts law....

What other alternative is left for the teachers to receive an equitable settlement--a strike, which is illegal.

Until the "collective begging" law is changed and teachers are given the right to strike, I am afraid there will be more and more teacher unrest, slowdown, sickouts and strikes....

The thousands of teachers who are willing to strike are not ordinary criminals. Many of them strike reluctantly and with the conviction that there is no alternative. As one teacher expressed it:

....As a teacher and current member of a negotiating team, I fully support the right of public employes, including teachers, to strike. The decision, however, is an extremely painful and personal one for the individual involved. Ofter this decision takes place in agonizing circumstances because there is no other way out....

Teachers who have exhausted the legal remedies available (labor boards, mediation, fact-finding, etc.) and are still faced with no possibility of settlement after long, weary months of attempting to be reasonable may be left with only two choices: strike or crawl back on their knees. In such a case, there is really only one choice to make. If legislators, school boards, et al. deplore strikes, then it behooves them to provide strong alternatives through which public employes may seek redress for unresolved disputes....

Here is a teacher who prefers binding arbitration. Under present legislation, however, the strike is the only available action that is effective. This is how he

expressed his views:

> ....Strikes are disruptive, costly, and technically illegal; they are also effective when all else fails. Without them we are reduced to humbly petitioning the elected school officials for whatever they are disposed to offer us--take it or leave it.
>
> A system of binding arbitration would be a major improvement and an acceptable substitute, but until a fair, workable plan is offered, we're stuck with the strike....
>
> The strike is unwieldy and it hurts to use it, but it works and it's all we've got. The fact of its being illegal is unfair but has to be disregarded until a viable alternative presents itself. We may not yet have the right to strike, but we certainly have a moral and a professional obligation to be willing to strike when no other recourse is available.

More and more people believe that under existing circumstances, teacher strikes are justifiable. The widespread sympathy for striking teachers is illustrated in the New Haven teacher strike in the fall of 1975. The judge jailed 90 teachers for violation of a no strike injunction. 1,000 non-teaching school employees staged a sympathy walkout over the jailing of the teachers. Labor leaders, angry over the judge's refusal to release the 90 jailed striking teachers, called a one-day city wide walkout by 30,000 union workers. The walkout was approved by all 146 leaders of the 92 unions comprising the Greater New Haven Central Labor Council. The President of the Greater New Haven Central Labor Council called the jailings "a miscarriage of justice. These people are not criminals. They are not lawbreakers, no matter what the judge says."

Court Imposed Penalties are Ineffective

Penalties imposed by the courts are not effective deterrents to teacher strikes. When teacher strikers are sent to jail, they receive admiration, sympathy, and increased support.

In the New Bedford Massachusetts strike, 27 teachers were jailed and the teacher association must pay a fine of more than $337,000 by June 1, 1976. As a result, teachers associations throughout Massachusetts have launched a compaign to support the New Bedford Teachers by contributions to pay the fine. As has been noted, in the New Haven strike, jailing 90 teachers only produced a sympathy walkout by 30,000 union workers.

Fining and jailing teacher strikers have been counter productive. Such judical sanctions have increased the bitterness and determination of the strikers.

No Reprisal Provisions

Striking teachers have learned to insist on so called "no reprisal" or "amnesty" clauses in a settlement. The purpose of these clauses is to prevent the board of education and administration from punishing or discriminating against the strikers.

Colorado Springs suffered a twelve day strike in December, 1975. The teachers rejected a settlement solely because it contained insufficient amnesty provisions for the 1,200 strikers. When the amnesty provisions were improved, the teachers accepted the settlement. The amnesty provisions obtained by the Colorado Springs strikers include:

1. striking teachers return to the same positions they occupied prior to the strike;
2. there will be no board retaliation against members of the CSTA negotiations unit, nor any teacher who participated in the walk out;
3. there will be no retaliation against CSTA members for picket activities;
4. there will be no strike-related entries made in teachers' personnel files;

5. teachers close to retirement who participated in the strike retain full-service credit.

Teacher Strikes have been Legalized in Three States

In three states, Hawaii, Oregon, and Pennsylvania, teacher strikes are permitted under these conditions:

The strike is being called by the exclusive bargaining agent;

All impasse procedures have been exhausted;

A specified number of days has elapsed since the fact-finding board made its recommendations public;

The exclusive bargaining agent has given notice of its intent to strike;

The employer has had an opportunity to petition the public employee relations board or a court of law in the event of danger to the public's health and safety.

Candidates for President Support Legislation to Allow Teacher Strikes

Eight of the announced Democratic candidates for President responded to a series of questions sent by the Massachusetts Teachers Association. One of the questions asked, "Would you sign into law a collective bargaining law providing the right to strike for teachers where the health and safety of the community is not involved?" Six of the eight candidates answered, "yes." These are;

Senator Birch Bayh
Former Governor Carter
Former Senator Harris
Senator Jackson
Representative Udall
Governor Shapp

Although Governor Carter would grant teachers the legal right to strike, he said that he prefers the mechanism of binding arbitration. The two candidates who would not allow teachers to strike are Governor Wallace and Sargent Shriver. Shriver

explained his position. He said, "I am opposed to strikes without some process being created to resolve the impasse that occurs in public bargaining..." Shriver called for binding arbitration as a "final, last resort, to be utilized after all else fails as an alternative to a strike."

What Legislation Is Needed?

There is no doubt that legislation is needed, but there is confusion as to what that legislation should provide. What is needed is legislation that will provide an effective mechanism for resolving collective bargaining impasses in an equitable manner. Binding arbitration as the final step for resolving impasses is an effective mechanism. Possibly, it is not the only effective mechanism.

Legalizing strikes in public education, however, does not provide an effective due process for settling impasses. The strike is an extreme form of protest. Legal or not, there have been hundreds of strikes in public education every year. Unless an effective mechanism is provided, there are likely to be hundreds of teacher strikes in the years ahead. Legalizing teacher strikes does not solve the problem. For all concerned - teachers, children, taxpayers, the strike is a disruptive, disturbing, wasteful, and expensive action. Moreover, strike action does not necessarily lead to the equitable settlement of an impasse. The solution which is forged in the heat of a strike may be based on pressure and emotion. Moreover, the animosity that thrives in a strike and the recrimination that follows it, provide a poor climate for harmony and cooperation in the day-to-day administration of whatever settlement is made.

What is needed is a wise legislative solution rather than the legislative encorsement of an extreme form of protest. Governor Carter and Mr. Shriver are on the right track. After twenty-five years and more than a thousand teacher strikes, there should be no doubt that there is urgent need for an effective mechanism. In the spirit of Thomas Edison, "There is a better way and we have found it." Legislation should be enacted to provide binding arbitration as the

final step in settling collective bargaining impasses. It is time for the responsible, sensible people in all communities to call for constructive, effective legislation!